174 (2)

Supreme Court, U.S.
FILED
NOV - 5 2010
OFFICE OF THE CLERK

No. 10-416

IN THE
Supreme Court of the United States

JESSE JAY MONTEJO
Petitioner,

v.

STATE OF LOUISIANA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF IN REPLY TO OPPOSITION

G. BEN COHEN*
BIDISH SARMA

THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955
benc@thejusticecenter.org

ROBERT J. SMITH

CHARLES HAMILTON HOUSTON
INSTITUTE FOR RACE & JUSTICE
125 Mount Auburn Street
Cambridge, MA 02138

**Counsel of Record for Petitioner*

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BRIEF IN REPLY

Petitioner Jesse Jay Montejo hereby submits this reply in support of his petition for a writ of certiorari, filed on September 22, 2010.

This Court discarded the prophylactic rule of *Michigan v. Jackson*[1] because it determined that the *Miranda-Edwards*[2]*-Minnick*[3] line of cases "suffice[d]" to protect "a suspect's voluntary choice not to speak outside his lawyer's presence." *Montejo v. Louisiana*, 129 S.Ct. 2079, 2090 (2009) (*quoting Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring)). This case tests the validity of that proposition. Neither the Louisiana Supreme Court[4] on remand, nor the *State's Opposition Brief*, suggests that this was an instance of unencumbered free will; rather it is an example of how deceitful police conduct can undermine the ability of a suspect to make a voluntary choice to communicate only through counsel.

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[1] *Michigan v. Jackson*, 475 U.S. 625 (1986).

[2] *Edwards v. Arizona*, 451 U.S. 477 (1981).

[3] *Minnick v. Mississippi*, 498 U.S. 146 (1990).

[4] *State v. Montejo*, 40 So. 3d 952 (La. 2010).

I. The Opposition Brief Does Not Contest That the Louisiana Supreme Court Agreed that State Law Permits Appellate Use of Trial Testimony to Challenge the Admissibility of a Statement

This Court observed that "Montejo understandably did not pursue an *Edwards* objection, because *Jackson* served as the Sixth Amendment analogy to *Edwards* and offered broader protections." *Id.* at 2091. Nevertheless, the *State's Brief in Opposition* argues that Montejo's failure to pursue the *Edwards*' objection forever forecloses review. This Court recognized that there was a good reason Montejo had not pursued the *Edwards* claim: the State had never asked the trial court, the Louisiana Supreme Court, or the Supreme Court of the United States to eliminate the rule of *Michigan v. Jackson*. [5]

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[5] The *State's Brief in Opposition* spends considerable effort asserting that defense counsel on Mr. Montejo's original appeal either did not raise or else waived the *Edwards* issue. But, had the State raised either in the trial court, the Louisiana Supreme Court or in this Court the assertion that *Michigan v. Jackson* should be overruled, Mr. Montejo would have been on notice to argue as a separate and additional ground the *Edwards* violation. Instead, the State never raised the claim, and only argued that *Jackson* should be overruled after this Court asked the parties to brief the question.

The sole procedural question this Court remanded to the Louisiana Supreme Court was whether Montejo's testimony at the trial came too late to prevail on the issue – not whether he could raise the issue at all. There is a marked difference between determining whether testimony admitted at trial is relevant to suppression (true under state law), and imposing a new procedural rule that requires defendants to anticipate – without any claim by the State challenging the law – adverse changes in the law and file pleadings prior to trial in contemplation of these unrealized jurisprudential changes.

The Louisiana Supreme Court grudgingly conceded that Montejo's testimony did not come too late to affect the admissibility of the apology letter – "a reviewing court may consider trial testimony in determining whether a motion to suppress should have been granted" – but did so only in the context of creating a unique procedural bar.[6] Pet. App. 10a.

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[6] While Petitioner asserts that this new procedural rule is unfounded, the *State's Brief in Opposition* defends the application of this procedural rule by citing to an intermediate appellate court decision (one decided after Montejo's conviction and death sentence no less). See *State's Brief* citing *State v. Jackson*, 904 So. 2d 907 (La. App. 5 Cir. 2005) . The argument is inapposite; this Court did not remand the matter to determine whether Louisiana law precludes the litigation of a

Under state law, new evidence on legal claims is admissible at the trial of the merits. In *State v. Joseph*, 434 So. 2d 1057 (La. 1983), the parties agreed to stipulate to the evidence that would be presented at trial (limiting it to evidence presented at the suppression hearing). But, the defendant at trial "testified that the confession was beaten out of him." *Id.* at 1061 n.3. The Louisiana Supreme Court explained that the State then had "choice to present rebuttal evidence to 'rehabilitate' the confession, or not." *Id.* The Court noted that had the defendant been convicted, he would have been entitled to a remand of the case for a rehearing on the suppression issue. *Id.*

The same treatment is warranted here. In this case, this Court remanded to the Louisiana Supreme Court to permit a full fact-finding concerning the circumstances of the State's interrogation of Mr.

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new claim on appeal, but instead whether—assuming a timely objection had been made—Montejo's trial testimony could be considered under Louisiana law. The Louisiana Supreme Court's remand opinion clearly states that Montejo's testimony could be considered. Pet. App. 45a *citing State v. Burkhalter*, 428 So. 2d 449, 455 (La. 1983) and *State v. West*, 408 So. 2d 1302, 1308 (La. 1982) ("Although the state put on no evidence at the hearing on the motion to suppress, we look to the totality of the evidence produced both at that hearing and at trial when we assess whether the state has carried its burden").

Montejo. Petitioner urged the Louisiana Supreme Court to remand the matter to the district court for that fact-finding (which would have also provided the State an opportunity to rebut Mr. Montejo's claims). The Louisiana Supreme Court did not take the opportunity to allow supplementation of the record. Montejo still awaits substantive review of his claims – including the resolution of factual discrepancies – and urges this Court either to remand again or reverse outright.

II. The State's Brief Does Not Contest that Both the Trial Court and the Louisiana Supreme Court Erroneously Conflated the Fifth and Sixth Amendments Under *Moran v. Burbine*[7]

In the *Petition for Certiorari*, Mr. Montejo noted – as members of this Court had observed in oral argument – that deception acceptable under the Fifth Amendment was not appropriate under Sixth Amendment. *See Petition for Certiorari* at 20-30 (discussing *Moran v. Burbine*). The *State's Brief in Opposition* does not contest that the trial court's legal decision and the Louisiana Supreme Court's ruling were predicated upon a legal interpretation of *Burbine* that specifically conflated the Fifth and Sixth Amendments. R. 1067-68 ("The [district] court

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[7] *Moran v. Burbine*, 475 U.S. 412 (1986).

looks to the jurisprudence not only of Louisiana but as handed down by the United States Supreme Court and this Court relies upon the decision of *Moran versus Burbine* which . . . states that the [] case narrowly construed the defendant's *Miranda* rights by holding that only the accused himself can invoke the right to an attorney not withstanding deceptive tactics by the arresting officers."); *State v. Montejo*, 974 So. 2d 1238, 1262 n.69 (La. 2008) ("Even if defendant's statement is true and the police did tell defendant he did not have a lawyer, this does not rise to the level of the facts presented in *Moran v. Burbine*, supra. In that case, the United States Supreme Court permitted a *Miranda* waiver to stand under the Sixth Amendment where a suspect was not told that his lawyer was trying to reach him during questioning and the lawyer was told by police that the defendant would not be questioned without the lawyer's presence."). These claims are preserved and should now be decided on the basis of the record before the Court.[8]

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[8] *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991) ("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided."); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Mills v. Maryland*, 486 U.S. 367, 371 n.3 (1988).

III. Neither The Louisiana Supreme Court Nor The State Contends That The Introduction Of The Letter Was Harmless Beyond A Reasonable Doubt In The Penalty Phase

The *State's Brief in Opposition* does not even allege that the introduction of the September 10th apology letter was harmless (much less beyond a reasonable doubt) at the penalty phase. The Louisiana Supreme Court similarly did not find the introduction of the apology letter to be harmless with respect to penalty.

Moreover, both the *Brief in Opposition* and the *remand opinion* fail to rebut Montejo's point that the letter was harmful at the guilt phase primarily because it provided the only evidence corroborating the unreliable statement that Montejo gave to the police on September 6th after enduring more than seven hours of deceitful and coercive interrogation (during which he asked to answer no more questions without counsel). Montejo's trial testimony, which corroborated the version of events he relayed multiple times to the police on the 6th, indicates that he was not Ferrari's shooter. The letter's introduction was central to the determination whether the crime constituted first or second-degree murder.

Because the State court was silent on the question of whether the introduction of this evidence

was harmless with respect to penalty, as well as with respect to the difference between first and second degree murder,[9] this Court can make that determination in the first instance.

IV. Montejo Raised the Relevance of the September 6th *Edwards* Violation on Remand

Montejo raised the *Edwards* issue with respect to the September 6th statement both in his original brief to the Louisiana Supreme Court and on remand from this Court.[10] The detective's treatment of Montejo on September 6th is both an independent constitutional violation, and, in light of the remand, strong corroborating evidence that Montejo did not make a free, knowing and intelligent waiver of his right to counsel. The detectives admitted to lying to Montejo on the 6th to try to obtain a confession. *See Montejo*, 974 So. 2d at 1245 n.26; *id.* at 1246 n.28; *id.*

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[9] The Louisiana Supreme Court reviewed the evidence that placed Montejo at the scene of the crime and concluded that his guilt was not effected by the admission of the apology letter, but that court did not determine whether the apology letter harmed Montejo's efforts to prove that he did not commit first-degree murder and that he should not be sentenced to death for his role in the crime.

[10] Notably, the *Brief in Opposition* does not assert that the conduct in this case did not constitute an *Edwards* violation.

at 1246 n.29; *id.* at 1246 n.30. The Louisiana Supreme Court noted the "hectoring" tone the detectives used when communicating with Montejo immediately following his clear assertion of the right to counsel, and even noted that the detective's conduct on the 6th merited "close scrutiny." *Id.* at 1265. The disregard for Montejo's rights displayed on September 6th exacerbates the falsehoods that the detectives relayed to Montejo on the 10th, and contextualizes Montejo's confusion when the detectives told him that he did not have counsel. This Court should review the police (mis)conduct on September 6th, because the totality of the circumstances make clear that the statements secured from Montejo resulted from police pressure and trickery, rather than Montejo's free-will.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and vacate the Louisiana Supreme Court's decision. This Court should either remand the case to the Louisiana Supreme Court or else reverse outright.

Respectfully submitted,

G. Ben Cohen*
Bidish Sarma

The Capital
Appeals Project
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955

Robert Smith

Houston Institute for
Race & Justice
125 Mount Auburn St.
Cambridge, MA 02138

*Counsel of Record for Petitioner